[illegible] D. C. (doing business as [illegible]) [illegible] G. B[illegible], individually [illegible]
[illegible] corporation,

[illegible]

vs.

National Labor Relations Board,

R[illegible]

REPLY BRIEF IN SUPPORT OF PE[illegible]
FOR A WRIT OF CERTIORARI

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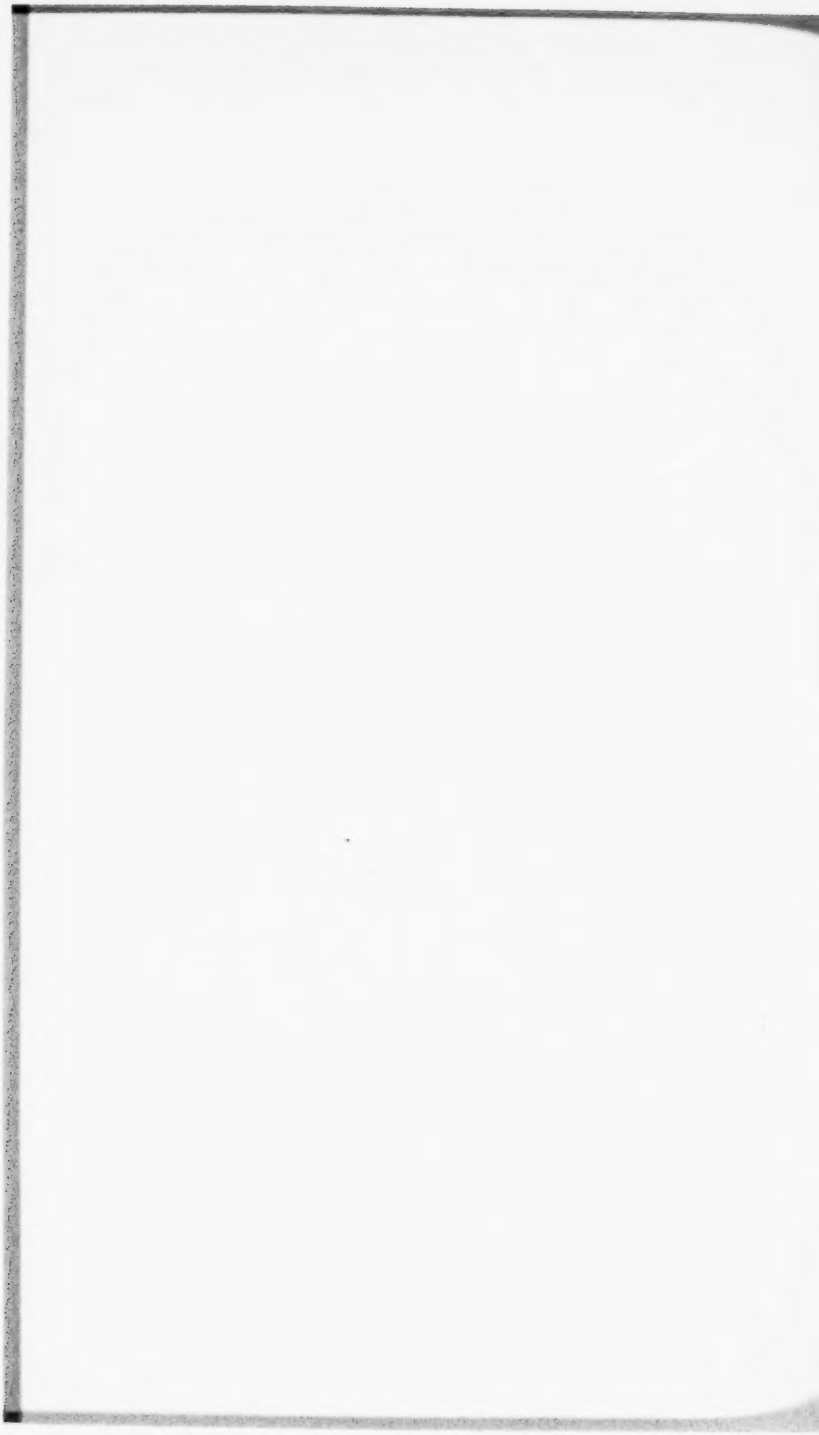

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IN THE

Supreme Court of the United States

October Term, 1953
No. 398.

CAPITAL SERVICE, INC., doing business as Danish Maid Bakery, and G. BRASHEARS, individually and as President of said corporation,

Petitioners,

vs.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI.

ARGUMENT.

I.

Garner v. Teamsters Is Not Decisive of the Instant Case.

Respondent, in its brief, states at page 11 that the instant proceeding should be disposed of in accordance with the decision of this Court in *Garner v. Teamsters,* No. 56, this term, decided December 14, 1953. We submit that the *Garner* case does not control the instant proceedings, for the reason that the *Garner* case decided only that where an employer seeks relief under a state *labor law* which is virtually identical to the federal labor law, Re-

spondent has exclusive jurisdiction over the parties and subject matter. In the instant proceedings, Petitioners filed suit in the state court to enjoin the unions from illegally restraining trade of Petitioners in violation of the California *restraint of trade statute*. The issue in the instant proceedings, as set out in Petitioners' Opening Brief, is whether or not Respondent has jurisdiction to enjoin Petitioners from prosecuting their *restraint of trade* suit in the state court. We respectfully submit that the National Labor Relations Act has no application whatever in a case involving no legitimate labor objective or labor dispute. If the activities of the unions involved have for their objective the illegal restraint of Petitioners' trade, a restraint of trade statute, either federal or state, is applicable, not a labor relations statute. The facts alleged in the state court action did not constitute a labor dispute under either state or federal law. We submit, therefore, that the *Garner* case is not decisive of this appeal.

The *Garner* case does not control this proceeding for the additional reason that this court stated in the *Garner* case that a state court has jurisdiction where the Federal Board has declined to exercise its powers, once its jurisdiction has been invoked. That is exactly the situation which exists in this case. After Petitioners obtained an injunction in the state court, the Board in the instant proceeding successfully enjoined Petitioners from utilizing this injunction. The Board's jurisdiction was upheld by the Ninth Circuit Court, 204 F. 2d 848, on the basis that all of the union activity was illegal under Sections 8(b)(1)(A) and 8(b)(4)(A) of the federal law. Petitioners filed a motion with the Board to modify the order issued in *Capital Service, Inc.*, 100 N. L. R. B. 1092

(wherein the Board did nothing more than enjoin the union from engaging in delivery entrance picketing in violation of Section 8(b)(4)(A)), and enjoin all picketing in accordance with the decision of the Ninth Circuit Court. The Board refused to modify its order. (*Capital Service, Inc.*, 106 N. L. R. B. No. 27 (July 17, 1953).) Thus, we have the anomalous situation that on April 3, 1952, the state court declared all of the union activity illegal, and on January 30, 1953, and again on May 12, 1953, the Ninth Circuit Court declared all of the union activity illegal under federal law, and yet the Board has successfully prevented Petitioners from obtaining relief from the illegal picketing *under either* state or federal law for eighteen months. We submit that this "dog in the manger" policy of the Board, wherein the Board takes jurisdiction from the state court and then refuses to grant the relief called for under federal law, should not be countenanced by this Court, and that in this situation this Court should hold that the state court has jurisdiction over the parties and subject matter under state law.

We will not attempt the Herculean task of persuading this Court to reverse the *Garner* decision. Needless to say, we think this Court erroneously decided the *Garner* case, and has ignored completely any reference to the legislative history of the Act, wherein is contained numerous expressions of opinion by various Congressmen that the federal law was intended only to complement state law, and not exclude state law except where there is direct conflict in right or remedy. See, for example, 2 Leg. Hist. 1379, 1380, where Senator Wherry posed the problem of a man with a load of milk which he cannot deliver to Omaha, Nebraska, because the union refuses to handle it. Senator Wherry contended the injunctive pro-

cesses of the Board were fraught with delay and subject to the whim and caprice of some "Government lawyer" (a striking resemblance to the facts of the instant case). Then the following transpired:

> "Mr. Pepper: I am not sure but that the local citizen the Senator from Nebraska describes would have the right of injunctive relief in a local court. We are simply giving the right in the Federal Court, but he still has local machinery of which he may avail himself to prevent irreparable damage, if he can make a showing. It seems to me this would bring the matter into Federal jurisdiction.
>
> Mr. Wherry: I agree that there are remedies in every State, but we are passing a Federal law, to give injunctive relief.
>
> Mr. Pepper: The Senator would probably find the circuit judge closer than the Federal judge in most States, and I suggest a man would have a complete and adequate remedy in the local courts."

Conclusion.

It is respectfully submitted that the Petition for Writ of Certiorari be granted and that the Court settle, with finality by its judgment the uncertainty and conflict in the law which now exists.

Respectfully submitted,

CARL M. GOULD for
HILL, FARRER & BURRILL and
HYMAN SMITH,
Attorneys for Petitioners.

Los Angeles, California, December, 1953.